82-1948

No. .....

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In The

Supreme Court of the United States

October Term, 1982

ED CANTRELL,

Petitioner,

vs.

REBECCA L. ROSA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL ROSA, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Tenth Circuit Court of Appeals abuse its judicial function in reversing factual findings of the District Court and by making its own factual findings which were not supported by the record?

2. When a state statute of limitations is adopted for use under a federal statute, must a court also adopt the state statutory scheme for tolling the statute of limitations?

3. Does a plaintiff suing for wrongful death damages she sustained due to the death of her husband have a cognizable claim under 42 U. S. C. § 1983?

PARTIES TO PROCEEDING

Respondent, Rebecca L. Rosa, is the personal representative of the Estate of Michael Rosa, deceased, and was the plaintiff in the District Court.

Petitioner, Ed Cantrell, was the Public Safety Director for the City of Rock Springs, Wyoming. Other defendants who are not parties to this appeal are Matt Binder and James Callas who were city police officers and the City of Rock Springs. All other defendants were dismissed by Stipulation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS

OPINION BELOW

The decision of the United States Tenth Circuit Court of Appeals sought to be reviewed was dated and entered on December 10, 1982. The opinion is enclosed as Appendix 10-44.

STATEMENT OF JURISDICTION

The decision of the United States Tenth Circuit Court of Appeals sought to be reviewed was issued on December 10, 1982. Petitioner moved for rehearing of the Court's decision on January 14, 1983. The Petition for Rehearing was denied by the United States Tenth Circuit Court of Appeals on March 2, 1983.

This Court has jurisdiction to review the decision of the Tenth Circuit Court pursuant to 28 U. S. C. § 1254 (1).

STATUTES CONSTRUED

This case involves the following statutes:

42 U. S. C. § 1983[1]
42 U. S. C. § 1988[2]
Wyo. Stat. § 1-4-101[3]
Wyo. Stat. § 1-3-115[4]
Wyo. Stat. § 1-3-116[5]
Wyo. Stat. § 2-14-201[6]
Wyo. Stat. § 2-14-202[7]
Wyoming Rules of Civil Procedure, Rule 3(b)[8]

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[1]App., 44-45
[2]App., 45
[3]App., 46
[4]App., 46-47
[5]App., 47
[6]App., 47-48
[7]App., 48
[8]App., 45-46

STATEMENT OF CASE

On July 15, 1978 Ed Cantrell, Public Safety Director for the City of Rock Springs, Wyoming, shot and killed Rock Springs undercover detective Michael Rosa. Mr. Cantrell was later acquitted of first degree murder after a plea of self-defense.

The plaintiff's Complaint set forth two claims for relief. Count one sought recovery against defendant Ed Cantrell under the Wyoming wrongful death statute.[1] Count two sought recovery of her monetary damages against all defendants for violations of Michael Rosa's civil rights.[2] Jurisdiction was based upon both diversity of citizenship under count one[3] and federal question jurisdiction under count two.[4]

The plaintiff attempted to serve defendant Ed Cantrell through his estranged wife in Rock Springs, Wyoming on September 4, 1980, pursuant to Rule 4(d) (1) of the Federal Rules of Civil Procedure.[5] Ed Cantrell was not personally served with process until October 17, 1980, ninety-four days following the filing of the Complaint.[6]

Defendant Ed Cantrell moved the District Court to quash the September 4, 1978 service on his estranged wife[7] as it was not served to a suitable person at his usual place of abode.[8] The District Court determined on uncontroverted affidavits[9] that the Rock Springs residence where the service of process took place was not Ed Cantrell's

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[1]Wyo. Stat. § 2-14-201
[2]42 U. S. C. § 1983
[3]28 U. S. C. § 1332(a)
[4]28 U. S. C. § 1343(3), § 1331
[5]Record Vol. I, 28-29
[6]Record Vol. I, 53-54
[7]Record Vol. I, 43
[8]Fed. R. Civ. P. 4(d)(1)
[9]Record Vol. I, 44, 69

dwelling or usual place of abode.[10] The District Court determined such service of process was insufficient to obtain personal jurisdiction over the defendant and therefore quashed the service of process.[11]

Defendant Ed Cantrell moved to dismiss the wrongful death count[12] on the grounds the plaintiff failed to commence her action within the two year statute of limitation.[13] The Wyoming Rules of Civil Procedure provide an action is commenced when the Complaint is filed if the defendant is served with process within sixty days of the filing of the Complaint. If service is not made within sixty days, the action is commenced on the date service is procured.[14]

The District Court ruled that service of process was made on Ed Cantrell on October 17, 1980, ninety-four days after the suit was commenced. The trial court found that the sixty day service rule[15] was an integral part of the Wyoming statute of limitations and under the doctrine of *Walker v. Armco Steel Corp.*,[16] the action was commenced on October 17, 1980 and was barred by the two year statute of limitation.[17] The District Court dismissed count one of the Complaint.[18]

Defendant Ed Cantrell also moved to dismiss count two of the Complaint based upon 42 U. S. C. § 1983.[19] De-

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[10]Record Vol. I, 79; App. 3
[11]Record Vol. I, 80; App. 3
[12]Record Vol. I, 55
[13]Wyo. Stat. § 2-14-202(d); App. 48
[14]Wyo. R. Civ. P. 3(b); App. 45-46
[15]Id
[16]446 U. S. 740, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)
[17]Wyo. Stat. § 2-14-202(d); App. 48
[18]Record Vol. I, 78-83; App. 1-6
[19]Record Vol. I, 55-65

fendant argued that since 42 U. S. C. § 1983 does not provide for a statute of limitations, 42 U. S. C. § 1988 instructs the courts to look to the law of the state where the action arose and use the most analogous statute of limitations, including the statutory scheme for determining when the statute of limitation is tolled.[20] Since the Court determined the sixty day service rule was an integral part of the Wyoming statute of limitations scheme, the Wyoming rule would be used for determining when the action was commenced for statute of limitation purposes. The action would have been commenced on October 17, 1980 and thus barred by the two year statute of limitations for federal statutes.[21]

The District Court determined count two was subject to a two year statute of limitation.[22] However, since the second count was based upon a federal statute, the court ruled the action was timely commenced when filed on July 14, 1980 pursuant to the Federal Rules of Civil Procedure.[23] The District Court denied the defendant's Motion to Dismiss Count Two based upon the statute of limitations.[24]

The defendant also took the position the plaintiff lacked standing to bring an action under 42 U. S. C. § 1983 for the damages she sustained due to the violations of another's constitutional rights. The defendant took the position that 42 U. S. C. § 1983 does not provide for the survival of claims when the person whose rights were

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[20]*Board of Regents v. Tomanio*, 446 U. S. 478, 483, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980)

[21]Wyo. Stat. § 1-3-115

[22]Id, Record Vol. I, 75-77; App. 7-9

[23]Fed. R. Civ. P. 3

[24]Record Vol. I, 75-77; App. 7-9

violated dies. Under 42 U. S. C. § 1988 courts must look to the state law where the action accrued to determine if such an action would survive.[25]

Under Wyoming law the plaintiff is limited to recovery of her own damages and not those of the person whose rights were allegedly violated.[26] The defendant argued the plaintiff had no valid claim under 42 U. S. C. § 1983 for damages she sustained due to violations of another's constitutional rights. The District Court did not specifically address this issue in denying the defendant's Motion to Dismiss Count Two of the Complaint.

Both parties filed respective cross-appeals on the District Court's rulings. The Tenth Circuit Court of Appeals reversed the District Court's dismissal of count one and remanded the case to the District Court for trial on both counts.[27] In its opinion the Circuit Court reversed the trial court's factual finding and determined the Rock Springs residence was Ed Cantrell's usual place of abode at the time of the September 4, 1980 service on his estranged wife.[28] The Court added the factual finding Mr. Cantrell either concealed himself or absconded from the state and that the statute of limitations had been tolled.[29] The Circuit Court also ruled the plaintiff had standing to pursue the 42 U. S. C. § 1983 action for her own damages.[30] The defendant moved for a rehearing on the determinations of the Court. The petition for rehearing was denied.

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[25] *Robertson v. Wegmann*, 436 U. S. 584, 587, 98 S. Ct. 1991, 56 L. Ed. 2d 544 (1978)

[26] Wyo. Stat. § 1-4-101; *Parsons v. Raussalis*, 488 P. 2d 1050 (Wyo. 1971)

[27] App. 10-44

[28] App. 16-25

[29] App. 26-27

[30] App. 37-44

ARGUMENT

There are three separate and compelling reasons for this Court to grant certiorari for review of the decision rendered by the Tenth Circuit Court of Appeals.

First, the Circuit Court abused its appellate function by making factual findings which were not supported by the record, contrary to factual findings of the District Court and on issues not raised by the parties.

Second, an important federal question between the relationship of 42 U. S. C. § 1983 and a state statute of limitations scheme adopted by the application of 42 U. S. C. § 1988.

Third, an important federal question as to whether a person can pursue her own damages under 42 U. S. C. § 1983 due to the violation of the federal rights of another where the state law being borrowed only allows the recovery of wrongful death type of damages.

I. Circuit Court's Abuse of Appellate Function

When the District Court issued its ruling on count one of the Complaint, it made a factual finding that on September 4, 1980 the Rock Springs residence of defendant Ed Cantrell's estranged wife was not Ed Cantrell's usual place of abode. The trial court made this determination based upon the uncontested affidavit of Norma Cantrell.[1] The plaintiff filed no pleading or affidavit in opposition to the defendant's Motion to Quash. At the hearing on the defendant's motion, the plaintiff's counsel con-

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[1]Record Vol. I, 44-45

ceded that the Rock Springs residence was not Mr. Cantrell's residence or usual place of abode.[2] Finally, in her Appellate Brief, the plaintiff expressly stated that she did not dispute the finding that the Rock Springs residence was not the defendant's dwelling or usual place of abode.[3] In short, the issue of the defendant's usual place of abode was not an issue on appeal.

Nor did the plaintiff ever allege or raise the issue that Ed Cantrell had concealed himself or absconded from the state to avoid service. Therefore, no argument or evidence was submitted on such issues, the trial court made no ruling on such issues and the questions were not presented as issues on appeal.

However, in the Circuit Court's opinion, the issues of Mr. Cantrell's usual place of abode and whether he concealed himself from process or absconded from the state were suddenly interjected into this case. In summarily reversing the trial court's factual findings, the Circuit Court made numerous findings based upon supposition and conjecture and totally unsupported by the record or any position taken by the parties to the lawsuit.

The Circuit Court ruled the Rock Springs residence was Mr. Cantrell's usual place of abode and further speculated Mr. Cantrell had concealed himself from service or absconded from the state bringing into operation a Wyoming tolling statute.[4] In support of such findings, the Circuit Court stated Mr. Cantrell was not in the coun-

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[2]Record Vol. II, 46, lines 11-12
[3]Appellant's Brief, 11
[4]Wyo. Stat. § 1-3-116

ty where the homicide took place,[5] had suddenly disappeared from Rock Springs,[6] had departed at a critical time,[7] and that he had not been gone for a long period of time.[8] The record is totally devoid of anything to support such findings. As these issues were never raised by the parties at the District Court level or on appeal, there was never any reason to establish such facts by either party. Each finding was based on supposition, conjecture and speculation, unsupported by the record and irrelevant to the issues submitted to the Circuit Court for review.

The Circuit Court ruling violates the standard of factual review required by the Federal Rules of Civil Procedure[9] and pronouncements of this Court.[10] Generally, an appellate court should not upset a trial court's factual finding unless it is left with a definite and firm conviction that a mistake has been committed. Where the factual determinations are supported by substantial evidence, are not clearly erroneous or against the clear weight of the law, nor induced by an erroneous view of the law, they may not be disturbed by an appellate court.[11]

Further, while a Circuit Court of Appeals does have its own limited authority to make its own findings of fact, it cannot make its own findings of facts unless the record so permits.[12]

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[5]App., 12
[6]App., 20
[7]App., 18
[8]App., 25
[9]Rule 52(a), Fed. R. Civ. P.
[10]*United States v. United States Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 2d 746 (1948)
[11]*United States v. Minneapolis and St. Louis Railroad Co.*, 260 F. 2d 633 (5th Cir. 1958)
[12]*United States v. One 1966 Volkswagen*, 490 F. 2d 381 (3rd Cir. 1973)

In the present action, the findings of the District Court were consistent with the only evidence submitted on the question as well as the positions of the parties. The findings of the District Court cannot be considered erroneous or against the weight of the law. Further, the record is totally devoid of any evidence to support the factual assumptions made by the Circuit Court of Appeals.

By failing to apply the clearly erroneous standard of review, the Circuit Court has acted in conflict with previous decisions of this Court. Also, the Circuit Court in rendering its unsupported decisions has so far departed from the usual and accepted course of judicial proceedings that this Court should exercise its supervisory powers over the Tenth Circuit Court of Appeals by reviewing this decision. This would not only assist the litigants to the present action but reaffirm guidelines to the Circuit Courts which they must follow in reviewing the decisions of District Courts. Therefore, the petitioner requests this Court grant review of the decision of the Circuit Court.

II. Was the 42 U. S. C. § 1983 Action Timely Commenced?

The second issue the petitioner asserts as grounds for this Court to grant certiorari involves an issue which has not been addressed by a previous decision of this Court. The issue involves the manner in which a federal statute, 42 U. S. C. § 1983, adopts a state statutory limitations scheme through 42 U. S. C. § 1988. The issue is not only important to the present case but can also be expected to arise in present and future litigation arising in a number of states.

The issue arises due to the fact that 42 U. S. C. § 1983 does not have its own statute of limitations. However, it was not intended by Congress that there would be no limitation period.[1] Instead, where the federal law is deficient, the Courts are obligated under 42 U. S. C. § 1988 to apply the most analogous state statute of limitation to a federal claim, including the state rules for tolling the statute of limitation so long as such rules are not inconsistent with federal law.[2]

The Wyoming statutes provide for a two year statute of limitation for claims arising under federal law.[3] As held by the District Court, the Wyoming sixty day service rule is an integral part of the Wyoming statute of limitations.[4] The rule determines for substantive purposes under the Wyoming statutes when an action is commenced for statute of limitations purposes.

When a federal court adopts a state statute of limitations for application to an action based under a federal statute, the Court adopts not only the statute of limitations but also the coordinate tolling rules.[5] In the present case this would include the substantive rules for determining when a statute is tolled by the commencement of an action. Here it would be the Wyoming sixty day rule.

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[1] *O'Sullivan v. Felix*, 233 U. S. 318, 322, 34 S. Ct. 596, 58 L. Ed. 980 (1914)

[2] *Johnson v. Railway Express Agency Inc.*, 421 U. S. 454, 462, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975);
Monroe v. Pape, 365 U. S. 167, 172, 81 S. Ct. 1716, 5 L. Ed. 2d 492 (1961);
Board of Regents v. Tomanio, 446 U. S. 478, 483, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980)

[3] Wyo. Stat. § 1-3-115

[4] *Walker v. Armco Steel Corp.*, 446 U. S. 740, 751, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)

[5] *Board of Regents v. Tomanio*, supra at 484

The District Court properly determined the 42 U. S. C. § 1983 count was subject to a Wyoming two year statute of limitation.[6] However, the District Court declined to apply the Wyoming commencement rule[7] and instead, simply applied the federal rule[8] for the commencement of an action. The Trial Court reasoned since the action was based on federal law, the federal procedural rule would apply.[9]

The Circuit Court did not truly address this issue. Since the Circuit Court altered the trial court's express factual findings and determined valid service was obtained on September 4, 1980,[10] the action would have been timely commenced under either rule. If this Court deems the Circuit Court's findings justified, there is no reason to review this issue.

As noted in the District Court's Order,[11] this Court in *Walker v. Armco Steel Corp.*,[12] specifically reserved the question of the use of a tolling provision for a statute of limitations where the limitation is borrowed from state law, if the cause of action is based on federal law.[13] Nor has this Court addressed this issue since the *Walker* decision.

The present question is exactly the issue deferred in the *Walker* case and affords this Court an excellent op-

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[6]Wyo. Stat. § 1-3-115
[7]Wyo. R. Civ. P. 3
[8]Fed. R. Civ. P. 3
[9]Record Vol. I, 75-77; App. 7-9
[10]App., 27
[11]Record Vol. I, 76; App. 9
[12]446 U. S. 740, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)
[13]*Walker v. Armco Steel Corp.*, supra at 751, n. 11

portunity to clarify the relationship between federal statutes and the state statutory schemes adopted under federal law. The issue is not only important in the present action but can be expected to arise in a number of other actions from states with similar commencement rules. Therefore, the petitioner notes there are special and important reasons for the Court to grant review of this case in order to address an important and recurring federal question which has not heretofore been addressed by the United States Supreme Court.

III. Does the Plaintiff Have A Valid Claim Under 42 U. S. C. § 1983?

The final issue upon which the petitioner seeks review again concerns the relationship between 42 U. S. C. § 1983 and state law adopted through 42 U. S. C. § 1988. The issue is whether the plaintiff has a cognizable claim for damages she personally sustained for the violations of another's rights under 42 U. S. C. § 1983. Again, an important and special issue not previously addressed by the United States Supreme Court.

42 U. S. C. § 1983 does not provide for the survival of claims if one whose rights are violated dies.[1] Further, federal common law does not allow recovery after the death of an injured party and any relief must come through legislation.[2] In order to carry out the remedial purposes of 42 U. S. C. § 1983, the federal courts have allowed for the survival of such actions under 42 U. S. C. § 1988 if the

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[1] *Robertson v. Wegmann*, supra at 587

[2] *VanBeck v. Sabine Towing Co.*, 300 U. S. 342, 346, 57 S. Ct. 452, 81 L. Ed. 2d 685 (1937)

jurisdiction where the action accrued provides for the survival of such actions.[3]

Wyoming statutes recognize two types of actions which survive the death of an injured person. Wyoming law provides for survival actions[4] and wrongful death actions.[5] Wyoming law clearly distinguishes between these two types of recovery.

Survival actions permit a decedent's personal representative to recover for injuries and damages sustained by the decedent during his lifetime. Such claims become an asset of the estate.[6] Wrongful death actions on the other hand are for damages not sustained by the decedent but the sole measure of damage is the loss sustained by the decedent's heirs.[7]

However, under Wyoming law, if a person dies as a result of the alleged wrongful act, recovery is limited to damages for wrongful death.[8] There is no dispute Mr. Rosa died of the alleged wrongful act. Therefore, under the Wyoming statutory scheme the plaintiff may not sue for the damages, if any, sustained by the decedent Michael Rosa. Instead she may only sue for her own losses due to the death of another.

The important federal issue becomes, does the plaintiff below have a recognizable claim under 42 U. S. C. § 1983 for damages she alone sustained due to the alleged violations of another's constitutional rights. This is an

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[3]*Robertson v. Wegmann*, supra at 588
[4]Wyo. Stat. § 1-4-101
[5]Wyo. Stat. § 2-14-201
[6]*DeHerrera v. Herrera*, 565 P. 2d 479, 482 (Wyo. 1977)
[7]*Coliseum Motor Co. v. Hester*, 34 Wyo. 298, 3 P. 2d 105 (1931)
[8]*Parsons v. Roussalis*, 488 P. 2d 1050, 1051 (Wyo. 1971); Wyo. Stat. § 1-4-101

important and special federal issue which has not been previously addressed by this Court and can be expected to arise in other litigation and should at this time be settled by the United States Supreme Court.

CONCLUSION

The petitioner prays the United States Supreme Court will grant this Writ of Certiorari and review the decision of the Tenth Circuit Court of Appeals due to the fact the Circuit Court has so far departed from an accepted or usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers. Further, the present appeal involves important questions of federal law which have not been ruled upon by this Court and should be settled by the United States Court not only for the resolution of this case but for the multitude of other cases which now exist or will arise in the future.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMINNG

No. C80-207K

REBECCA L. ROSA, as Personal Representative of Michael Rosa, Deceased,

Plaintiff,

vs.

ED CANTRELL, MATT BIDER, JAMES CALLAS, and THE CITY OF ROCK SPRINGS,

Defendant.

(Filed February 26, 1981)

ORDER GRANTING MOTION TO QUASH AND MOTION TO DISMISS WRONGFUL DEATH CLAIM
(With Findings)

The above-entitled matter coming on regularly for hearing before the Court upon defendant Cantrell's Motions to Quash and to Dismiss Count One of the Complaint, plaintiff appearing by and through her attorneys, George A. Zunker and Franklin J. Smith, and defendant Cantrell appearing by and through his attorneys, William K. Ris and James E. Fitzgerald, and the Court having heard the arguments of counsel in support of and in opposition to said motions, and having carefully considered the pleadings and the memoranda submitted by counsel, and being fully advised in the premises;

FINDS that Count One of the Complaint fails to state a claim upon which relief may be granted because it is barred by the statute of limitations, § 1-38-102 (d)

and Rule 3 (b) of the Wyoming Rules of Civil Procedure. Count One of the Complaint alleges a wrongful death action. Jurisdiction is based upon diversity of citizenship and the requisite jurisdictional amount. On July 15, 1978, undercover agent Michael Rosa was shot and killed by Cantrell, Rebecca Rosa, decedent's widow, brought this action seeking one million dollars in damages for the death of her husband.

Erie v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and its progeny require this Court to apply the law of the State of Wyoming in a wrongful death case. The statute of limitations time period to file a wrongful death claim is two years from the date the cause of action accrued. The Complaint was filed on July 14, 1980, one day before the two year period had ended. See Wyo. Stat. § 1-38-102 (d).

In addition to the actual statute of limitations, Rule 3 (b) of the Wyoming Rules of Civil Procedure provides additional requirements for the commencement of an action. Ordinarily, an action is commenced for statute of limitations purposes upon the filing of the complaint and Rule 3 of the Wyoming Rules of Civil Procedure and the Federal Rules of Civil Procedure so provide. However, Rule 3 (b) of the Wyoming Rules of Civil Procedure requires that the complaint be served within 60 days from the date of filing. If the complaint is not served within 60 days, the action is deemed to be commenced on the date of service.

Wyoming Rule of Civil Procedure 4 (d) requires that personal service is effected "by delivery of a copy of the summons and of the complaint to him personally, or by

leaving copies thereof at his dwelling house or usual place of abode . . ."

In the case at bar, service was attempted on September 4, 1980. The Complaint and Summons were served on Norma Cantrell, the defendant's estranged wife, in Rock Springs, Wyoming at 938 Truman Street. In an affidavit filed with this Court, Mrs. Cantrell stated that Ed Cantrell did not reside at 938 Truman Street, nor was said residence his usual place of abode. Another affidavit by Kellie Erickson, filed with this Court, states that the residence at 938 Truman Street is not owned by either Ed or Norma Cantrell.

Each step of Rule 4 is jurisdictional. The failure of any portion of the rule prevents this Court from securing jurisdiction over the defendant. Eee Emery v. Emery, 404 P. 2d 745 (Wyo. 1965).

This Court holds that the attempted service on September 4, 1980 was void and the Motion to Quash is hereby granted.

Counsel argues that Clause v. Columbia Savings and Loan Association, 16 Wyo. 450, 95 P. 54 (1908) can "resurrect" this Court's jurisdiction over Count I of the Complaint. Counsel further argues that a decision based on the statute of limitations is not a decision on the merits. Such a position is untenable. See Hildebrand v. Dart Industries, Inc., No. 78-1852 (10th Cir. 1980). Wyoming Statute § 1-3-118 allows a plaintiff to commence a new action within one year if the case is terminated other than on the merits.

The Clause case is distinguishable from the current action because, under the facts established by the affi-

davits, the defect in the service is sufficient to deprive this Court of jursdiction. The Clause case dealt with the operation of the Statute § 1-3-118 in connection with faulty service. There the court permitted the filing of the new action pursuant to the statute. The court noted, however, that the imperfection in the service was not sufficient to be jurisdictional. In Clause, the court held that service by the coroner was improper and the service was quashed. In the current action, the service was not at the defendant's residence or usual place of abode as required by Wyoming Rules of Civil Procedure 4 (d). Such an imperfection is jurisdictional and is more significant than service by the wrong party as occurred in the Clause case. Here, the defendant had no notice of the lawsuit againnst him.

Counsel would have this Court adopt the substantive statute of limitations but not follow the Wyoming procedural law found in Wyoming Rules of Civil Procedure 3 (b). Such a position is unsupportable in light of the Supreme Court decision in Erie, supra, and in Walker v. Armco, No. 78-1862, June 2, 1980. In the latter case, the court was considering an Oklahoma statute of limitations and a 60 day service requirement on all fours with the present case. The court held that the diversity action was barred by the statute of limitations. In reaching its decision, the court reviewed the history of cases dealing with the question of, "whether state or federal law should apply on various issues arising in an action based on state law which has been brought in federal court under diversity of citizenship . . ."

The landmark case of Erie, supra, held that in diversity cases the law of the appropriate state was to be

applied by the court. Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949) stood for the proposition that in a case where the action would be barred in state court under the state statute of limitations and civil procedure but would not be barred under the federal rules, the state statute would be applicable and the claims would be barred. In Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965), the court held that the Federal Rule is the standard of determination for when the action is commenced. Although Hanna did not expressly overrule Ragan, the test established by Hanna, "whether the difference between the Federal and State rules "would be of scant, if any, relevance to the choice of a forum", was the guiding principle for many federal courts. See Grabowski v. United States, 294 F. Supp. 421 (1968). Hanna was not the final pronouncement in this difficult area. In June of 1980, the Supreme Court decided Walker, supra. The facts in Walker are similar to the current action. In Walker, as noted above, the court considered an Oklahoma statute that provided an action can be commenced by the filing of a complaint if the defendant is served within 60 days, even though the service is outside of the limitations period. The court held that the action was barred by the Oklahoma statute of limitations and that, in diversity actions, Rule 3 of the Federal Rules of Civil Procedure controls for timing purposes under the Federal Rules but state statutes of limitations are not affected. The court specifically reserved the issue of federal question cases and made it clear that Walker was concerned with diversity cases only. See footnote 11.

This Court finds the reasoning of Walker to be persuasive. In the current action, the defendant was served

94 days after the Complaint was filed. The sequence of events was as follows:

(1) Cause of action accrued July 14, 1980 upon the death of Michael Rosa.

(2) Complaint filed July 14, 1980, one day before the end of the 2 year statute of limitations period.

(3) Attempted service—September 4, 1980; this Court holds service is inadequate and defective and, therefore, this Court is without jurisdiction.

(4) Actual service sufficient to give this Court jurisdiction—October 17, 1980, some 94 days after the Complaint was filed.

Under Wyoming Rule of Civil Procedure 3 (b), the date of the commencement of the action is October 17, 1980. Therefore, Count I of the Complaint, wrongful death, is barred by the Wyoming Statute of Limitations.

NOW, THEREFORE, IT IS

ORDERED that the Motion to Dismiss Count I of the Complaint, wrongful death, filed by and on behalf of the defendant Cantrell be and the same is hereby granted; it is

FURTHER ORDERED that the Motion to Quash filed by and on behalf of the defendant Cantrell be and the same is hereby granted.

Dated this 26th day of February, 1981.

EWING T. KERR
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C80-207K

REBECCA L. ROSA, as Personal Representative of Michael Rosa, Deceased.

Plaintiff,

vs.

ED CANTRELL, MATT BIDER, JAMES CALLAS, and THE CITY OF ROCK SPRINGS,

Defendants.

(Filed February 26, 1981.)

ORDER DENYING MOTION TO DISMISS CIVIL RIGHTS CLAIM
(With Findings)

The above-entitled matter coming on regularly for hearing before the Court upon defendant Cantrell's Motion to Dismiss Count II, civil rights, from the Complaint, plaintiff appearing by and through her attorneys, George A. Zunker and Franklin J. Smith, and defendant appearing by and through his attorneys, William K. Ris and James E. Fitzgerald, and the Court having heard the arguments of counsel in favor of and in opposition to said motion, and having carefully considered the pleadings and the memoranda submitted by counsel, and being fully advised in the premises;

FINDS that Count II of the Complaint alleges a civil rights violation pursuant to 42 U.S.C. § 1983. Jurisdiction is based upon 28 U.S.C. § 1331, federal question.

The issue before the Court is whether the second count of the Complainnt is barred by the statute of limitations.

This Court has held that in § 1983 actions, the appropriate state statute of limitations is applicable. Speigel v. School District No. 1 No. C77-042K, District of Wyoming. The Court of Appeals for the Tenth Circuit affirmed the Speigel case when it stated:

> We hold that the trial court applied the proper statute of limitations. Section 1983 contains no limitations provision. In such a circumstance, a federal court will generally apply the state statute of limitations which would be applicable to the most analogous state action. Here, the court applied a state limitations provision for "actions upon a liability created by a federal statute." The federal statute creating a liability for Speigel's First Amendment complaint is section 1983. (Citations omitted) . . . It is undisputed that Speigel's federal court claim was filed more than two years after his termination became final.

In the current action, the Complaint was filed within the two year statute of limitations as provided by Wyoming law. Wyoming Statute § 1-3-115 provides that:

> All actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which no period of limitations is provided in such statute, shall be commenced within two (2) years after the cause of action has accrued.

The cause of action accrued on July 15, 1978 upon the death of Michael Rosa. The Complaint was filed in a timely manner on July 14, 1980, one day short of the two year period.

Counsel would have this Court adopt the statutory and procedural law of Wyoming, specifically Wyoming Rule of Civil Procedure 3 (b), based on the Supreme

Court decision of Walker v. Armco, No. 78-1862, June 2, 1980. In Walker, the Supreme Court specifically stated:

> We do not here address the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law.

Thus, the Supreme Court made it very clear that the Walker analysis is applicable in diversity cases and not in those cases involving federal questions.

NOW, THEREFORE, IT IS

ORDERED that the Motion to Dismiss Count II of the Complaint, based on 42 U.S.C. § 1983, filed by and on behalf of defendant Cantrell be and the same is hereby denied.

Dated this 26th day of February, 1981.

EWING T. KERR
U. S. District Judge

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 81-1487 and 81-1504

REBECCA L. ROSA, as Personal Representative of Michael Rosa, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v.

ED CANTRELL,

Defendant-Appellee/Cross-Appellant,

and

MATT BIDER, JAMES CALLAS, and THE CITY OF ROCK SPRINGS,

Defendants-Appellees.

(Filed December 10, 1982)

Appeal from the United States District Court
For the District of Wyoming
(D. C. No. C80-0207K)

George A. Zunker, Urbigkit & Whitehead, Cheyenne, Wyoming, for Plaintiff-Appellant/Cross-Appellee.

Glenn Parker, Hirst & Applegate, Cheyenne, Wyoming, (James L. Applegate and Harold Frederick Buck, Hirst & Applegate, Cheyenne, Wyoming, with him on the brief) for Defendant-Appellee The City of Rock Springs.

Eugene S. Hames, Wood, Ris & Hames, Denver, Colorado, (William K. Ris, Wood, Ris & Hames, Denver, Colorado, and James E. Fitzgerald, Cheyenne, Wyoming, with him on the brief) for Defendant-Appellee/Cross-Appellant.

Before SETH, Chief Judge, DOYLE, Circuit Judge, and BOHANON, Senior District Judge.*

DOYLE, Circuit Judge.

This is a homicide case brought by the wife of the victim of the homicide, one Michael Rosa who was shot and killed by the defendant Cantrell on July 15, 1978. It was alleged that this was just two days before Rosa was to have appeared before a grand jury which had been empaneled by the State to investigate alleged corruption in Rock Springs. At the time Cantrell was employed by the City of Rock Springs, Wyoming as the Public Safety Director. The victim was an undercover agent who worked for the City and was under the supervision of Cantrell. The plaintiff Rebecca Rosa brought the action on July 14, 1980 in the United States District Court for the District of Wyoming. Her status was that of personal representative of her deceased husband. Count One was based on Wyoming's wrongful death statute, W. S. § 1-38-101, whereas Count Two alleged a cause of action arising under federal law, 42 U. S. C. § 1983. Named as defendants in this latter suit were Cantrell and the City of Rock Springs, Wyoming.

The principle issue in the case is whether the trial court erred in dismissing the wrongful death action. The court's conclusion was that the statute of limitations had run, a conclusion which was reached despite the fact that Cantrell had not been available for the service of summons during the period following the filing.

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*Honorable Luther L. Bohanon, Senior District Judge, District of Oklahoma, sitting by designation.

From the date of the filing the sheriff's office made an effort to locate Cantrell but he was not to be found. Finally on July 29, 1980, some two years following the incident, an alias summons was issued for Cantrell and service was attempted upon him in Douglas, Wyoming. This was unsuccessful. On August 14, 1980 a second alias summons was issued for Cantrell and was delivered to the U. S. Marshal in Sweetwater County, Wyoming. This summons, along with the complaint, was left with Cantrell's wife at their home in Rock Springs. The return of the Marshal stated that on September 4, 1980 he had served a copy of the summons and complaint with a person of suitable age residing in the defendant's usual place of abode (in Rock Springs). Mrs. Cantrell held the complaint and summons for two weeks during which time she neither reported to the marshal nor did anything. After the two weeks had passed she notified Rosa's counsel that Ed Cantrell had not been at that address and had not received the service. She further stated she did not know his whereabouts. However, personal service was ultimately made on Cantrell in Fall River County, South Dakota, on October 17, 1980.

Cantrell's counsel filed a motion to quash service and to dismiss the complaint against him on the ground that the statute of limitations had run. This contention was made notwithstanding the fact that he had not been present within the county in which the homicide occurred during the period following the filing of the complaint and the issuance of the summons.

The trial court dismissed the wrongful death claim against Cantrell on February 26, 1981. The judge found that this Court was barred by the statute of limitations,

§ 1-38-102 (d) and Rule 3 (b) of the Wyoming Rules of Civil Procedure. This latter Rule requires that the complaint be served within 60 days from the date of the filing of the complaint. If there is a failure to make this service within 60 days, then the action is deemed commenced on the date of service. The trial court also found that the attempted service on Cantrell on September 4, 1980 was void inasmuch as the place where the summons was left was not his usual place of abode.

The trial court also granted the motion of the City of Rock Springs to dismiss the § 1983 claim based upon the fact that the cause of action was said to have arisen July 15, 1978, and therefore the doctrine of sovereign immunity was in effect then. The court relied on the Wyoming case of Oroz v. Board of County Commissioners of Carbon County, 575 P. 2d 1155 (Wyo. 1978).

The court denied Cantrell's motion to dismiss the civil rights claim against him. It found here that the claim raised a federal question which was controlled by the Federal Rules of Civil Procedure; that this complaint was properly filed within the two year statute of limitations as provided by Wyoming law on July 14, 1980, just one day short of the two year period. A final judgment which was entered March 28, 1981 dismissed the wrongful death claim against him and also the civil rights claim as against the City of Rock Springs.

The contentions on appeal are that:

1. The trial court erred in dismissing the wrongful death claim against Cantrell as being barred by the statute of limitations;

2. The court erred in refusing to apply the Wyoming Savings Clause § 1-3-118 of the Wyoming statutes. This, as we will presently see, will allow the plaintiff to refile the complaint;

3. The court erred in refusing to uphold the service based upon the tolling of the statute of limitations;

4. The court erred in ruling that the City of Rock Springs was immune from suit under § 1983;

5. That if the City is not immune, nevertheless the dismissal of the § 1983 claim ought to be affirmed because of the state law defenses of payment and/or failure to file notice of a claim with the City;

6. That the court erred in determining that the § 1983 claim against Cantrell should not be dismissed as being barred by the Wyoming statute of limitations;

7. That the personal representative of the decedent had standing to bring this § 1983 claim on her behalf or on behalf of the descendants of the decedent.

I.

THE CONTENTION THAT THE ACTION COMMENCED IN ACCORDANCE WITH RULE 3 OF THE APPLICABLE FEDERAL RULE OF PROCEDURE

The argument of appellant is that the Supreme Court's decision in Hanna v. Plumer, 380 U. S. 460 (1965), applies to this case. In *Hanna* the Supreme Court held that in a diversity case service is governed by the Federal Rules of Civil Procedure, rather than those of the state. But this conflict between the *Hanna v. Plumer* decision and that in Ragan v. Merchants Transfer and Warehouse Co., 337 U. S. 530 (1949) has been settled by the Supreme Court in Walker v. Armco Steel Corporation, 446 U. S. 740 (1980). There is no rationale which supports the contention that *Hanna v. Plumer* is applicable. The decision

in *Walker* clearly dictates that the Wyoming Rules of Civil Procedure are to be applied in this diversity action.

This conclusion does not, however, end the matter. Even accepting the fact that the doctrine of Walker v. Armco Steel Corporation, 446 U.S. 740 (1980) governs this issue, we nevertheless are of the opinion that under all of the facts and circumstances here that personal jurisdiction over the defendant has been established; and that the service made at the defendant's home was effective; that the Wyoming Savings statute § 1-3-118 furnishes an alternative basis for obtaining jurisdiction over the defendant Cantrell.

II.

Do the facts and law establish the validity of the service of process based upon the delivery of the complaint and summons to Mrs. Cantrell on September 4, 1980? Was this his home in Rock Springs, Wyoming, or was the service valid by reason of the tolling of limitations statute W. S. Section 1-3-116? This nullifies the running of limitations during abscondence, absence or concealment. The alternative issue is whether, as a result of the absence, absoncondence (sic) or concealment by the defendant, the statute was tolled. We further consider whether the Wyoming savings statute is applicable.

The Wyoming Savings statute § 1-3-118 was also designed for situations like this where the plaintiff files the action in a timely manner and makes a diligent good faith effort to serve the defendant but is unable to complete service within the sixty day time period through no fault of his own. The various attempts at service dispel any notion of lack of good faith. This statute provides:

> If in an action commenced in due time, a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits and the time limited for the commencement of the action has expired at the date of the reversal or failure, the plaintiff, or his representatives if he dies and if the cause of action survives, may commence a new action within one (1) year after the date of the failure or reversal. This provision also applies to any claim asserted in any pleading by a defendant.

DO THE FACTS AND LAW ESTABLISH THAT SERVICE WAS VALID; THAT THE ACTION HAD COMMENCED WITHIN THE PROVISIONS OF WYOMING LAW?

We here address the issues as to whether the circumstances establish, first, the validity of the service on Sept. 4 as a result of delivery of the summons and complaint at his usual place of abode; or, in the alternative, as a result of absconding or leaving the state or concealment, does the Wyoming tolling statute § 1-3-116 apply so as to extend the period within which service could be made. A further alternative is whether the Wyoming saving statute is applicable.

The law having to do with this is basically procedural and does not go to liability from the standpoint of the merits. It is because these two points are interrelated that we take them up together.

There are several Wyoming statutes which come into play here and the first of these is the statute of limitations applicable to wrongful death. This is § 1-38-102 (d) of the Wyoming Code of Civil Procedure. It states in essence that every action shall be commenced within two years after the death of the deceased person.

In order to apply the two year period it is necessary to consider a rule of civil procedure, Rule 3 (b), which defines the phrase "commencement of action" which is mentioned in the limitations statute. It declares:

> For purposes of statutes of limitation, an action shall be deemed commenced on the date of filing the complaint as to each defendant, if service is made on him or on a co-defendant who is a joint contractor or otherwise united in interest with him, within sixty (60) days after the filing of the complaint. If such service is not made within sixty (60) days the action shall be deemed commenced on the date when service is made. The voluntary waiver, acceptance or acknowledgment of service, or appearance by a defendant shall be the same as personal service on the date when such waiver, acceptance, acknowledgment or appearance is made. . . .

Also essential is Rule 4 (d) of the Wyoming Civil Procedure which provides that service can be made by ". . . leaving copies at his dwelling house or usual place of abode with some member of his family . . . ."

The so-called savings provision § 1-3-118 is quoted above. It is in general effect an extension of the two year statute and offers a possible answer to the service of process challenge. It will be considered hereafter. It is a provision which offers relief in a situation in which the period of the statute of limitations has run.

* * *

We address ourselves first to the question whether the delivery by James Brody, Deputy United States Marshal, of the summons and complaint upon Norma Cantrell, the wife of the defendant, was valid. Mr. Brody said "Mrs. Cantrell advised me that although she had not seen

Mr. Cantrell for some time, he still called to talk to their son, Joe." Brody further said:

> I advised her to advise Mr. Cantrell, when he called, that I had served a complaint and summons upon him. I, thereafter, completed the return of service and forwarded it to the Clerk of the United States District Court for the District of Wyoming in the good faith belief that Mrs. Cantrell knew the whereabouts of Mr. Contrell, that she had contact with him, and that she could advise him that I had served him by leaving the copy of the complaint with her."

The circumstances here support the conclusion that Mr. Cantrell was indeed concealing himself during this period of time. He disappeared from Rock Springs very suddenly and thus was able to avoid the delivery of the complaint and summons to him personally. He was finally personally served on October 17, 1980 in South Dakota but this was 30 days after the time had run. But meanwhile timely service had been made on Sept. 4, 1980 when the documents were delivered to his wife at his dwelling house or usual place of abode. The statute of limitations then does not apply. As we view it the service at his place of abode was valid. In law the residence in Rock Springs, Wyoming was his place of abode. Also as a result of the tolling statute the Oct. 17th, 1980 service just referred to which occurred in South Dakota was within the period. This was not a situation in which the one effort was made to serve the process and thereafter nothing happened. There was in truth a good faith effort on the part of the plaintiff and the people acting on her behalf to notify the defendant that the suit had been filed.

We are aware that the burden is on the plaintiff to prove the absence of the defendant or to prove that he

had absconded in order to conceal himself. But the record clearly shows that he departed at the critical time and was concealed, presumably in South Dakota. He was in communication with his family at this time by phone. According to the tolling statute the limitations statute is stayed while he is absent from the state, has absconded or was secreted. From all appearances he had absconded from Wyoming when it was considered that the sheriff made several efforts to find him and serve him. An attempt was first made to find and serve Cantrell in Converse County, Wyoming on August 8, 1980. The sheriff was unable to locate him there. An attempt was then made to serve Cantrell at 938 Truman in Rock Springs, his last known place of residence. This was unsuccessful. Service was completed on September 4, 1980 by leaving a copy with the defendant's wife at 938 Truman. This service was later quashed by the district court. Finally personal service was made on the defendant successfully on October 17, 1980 in Fall River County, South Dakota. Two weeks after the summons and complaint had been left with her, Mrs. Cantrell returned them to Rosa's attorney saying that she did not know the whereabouts of Mr. Cantrell. By that time, which was around September 18th, the sixty day period which was allowed for service had run out. At the time of this service Mrs. Cantrell had advised Mr. James Brody, the Deputy United States Marshal, that although she had not seen Mr. Cantrell for some time, he still called to talk to their son, Joe. Brody advised her to advise Mr. Cantrell when he called that service of the complaint and summons upon him had been carried out. He then completed the return believing that the service was completed. Mrs. Cantrell did not report the fact that

she didn't know where he was until two weeks later. It is our opinion that this did not render the service void or even voidable. At the time this was indeed his usual place of abode. The existence of another abode has not been brought to anybody's attention in this case. This was service.

What is the meaning of "usual place of abode"? In the Federal Procedure Lawyers' Edition the abode service is discussed at some length. See § 65:68, and paragraph 65:69, Abode Service. This recognizes and authorizes the service of process on an individual by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion and residing therein. The text declares:

> Abode service is an alternative to personal service, and if this method of service is utilized, it is not necessary to show that the papers were served on a defendant personally or that the papers were delivered to the defendant by the person with whom they were left. However, under some circumstances a default judgment may be set aside for excusable neglect, mistake of fact, and inadvertence where the person served did not turn over the papers to the defendant.

The meaning of abode is stated in § 65:70:

> Generally speaking a person's usual place of abode is the place where he is actually living, except for temporary absences, at the time service is made. There is no hard and fast rule, and a determination of abode may require a practical inquiry as to where the defendant is actually living, and a review of the facts of the particular case. The inquiry is similar to that required in determining a person's domicil, although it has been held that a person may be a citi-

> zen of one place and have his usual place of abode in another.

Section 65:71 declares that:

> Generally speaking, a person only has one abode. Service may be made on a traveling defendant by leaving the papers at a place he has recognized as his legal residence, so long as he receives actual notice, even though his vocation takes him to other places on a regular basis and he only returns to the place where process was delivered when he has the opportunity.

It is further said:

> A person in the process of moving may be served at his former address, *where members of his family still reside, until he establishes a new abode elsewhere.* (emphasis supplied).

An annotation in 32 ALR 3rd takes up the meaning of "usual place of abode". At page 119 of 32 ALR 3rd the authors state:

> In general, if a person has an established home, *particularly a place at which his family resides, a mere absence,* even of considerable duration, does not destroy the established place as a usual place of abode, residence, or domicil, if the person has an intention of returning. If a person leaves an established place with his family, a more difficult question arises. (emphasis supplied).

At page 140, 141 of 32 ALR 3rd the authors consider the particular place from which the person was absent as being a family home where process was left. A number of cases are collected here which deal with the exact problem here, that is to say the contention that the place of dwelling or abode no longer exists due to absence or departure. The cases interpreting "dwelling house or place

of abode" at the time of the attempted service within the meaning of the statutes or rules of court, have found that "service under such circumstances has been upheld at least where the person, if a married man, maintained his family at the place from which he was absent, or, if a young, unmarried person, maintained close relations with his parents at such place." It is also stated:

> Thus, the fact that a defendant left his home for an extended period and traveled a considerable distance has been held not to have destroyed his original home as his 'usual place of abode', if he did not intend to change his residence, *as evidenced by his leaving his family behind,* and his subsequent return. (emphasis supplied) . . .
>
> In Shephard v. Hopson, 191 Ark. 284, 86 S. W. 2d 30 (1935), service was held properly made upon a wife remaining at home, notwithstanding testimony by the husband that he had left home, had separated from his wife, had moved to another state, and after securing a divorce, had continued to live elsewhere, where it appeared that a divorce had in fact not been obtained until a year after service was made, defendant had in fact been within the state conferring with attorneys at the time, and neither husband nor wife had indicated at the time of service that they had separated, the court thus finding that the intention of abandoning the former home had not developed at the time service was made on the wife.

That *Shephard* case is very similar in its facts to the case with which we are dealing. Other cases of a similar nature are Capitol Light & Supply Co. v. Gunning Electric Co., 24 Conn. Supp. 324, 190 A. 2d 495 (1963):

> where the defendant, aged 28 and unmarried, lived with his parents in Connecticut for many years before taking employment elsewhere, and thereafter he continued to participate actively in the family business

> located in Connecticut, as an officer, stockholder and employee and made application for an operator's license to the Connecticut Department of Motor Vehicles 2 days before service was made upon him by leaving a copy of the process at the parents' dwelling.

After reviewing all of the circumstances the Connecticut court held that:

> it was not unreasonable to believe that a young man 28 years of age, unmarried, would have, in view of the circumstances noted, a usual place of abode at the present home of his parents, there being no showing that defendant had intended to abandon his former home.

The court also stated that:

> A person could have two places of abode at the same time, each qualifying as a place at which subsituted service of process could be effected.
>
> Where a defendant left his usual place of abode for a few months to take a regular summer vacation at a prescribed place the regular, established place continued as his 'most notorious place of abode' during the vacation interval.

This was held in Venable v. Long Realty Co., 46 Ga. App. 803, 169 S. E. 322 (1933). It was held that:

> Where a bachelor lived with his sister at her residence during 8 or 9 months of each year, and moved with her to her summer home in another part of the county, living with her at this place during 3 or 4 of the summer months of each year, the former place constituted the usual residence and general lodging place of the person, and process could be served by leaving a copy at such former place, under a statute providing for the leaving of such process at defendant's 'most notorious place of abode'.

See also Bank of South Carolina v. Simpson, 27 SCL (2 McMull) 352 (1842) and Lovin v. Hicks, 116 Minn. 179, 133 N. W. 575 (1911),

> Where defendant owner of a furniture business, who had lived with his wife on the second floor of the business building, went to another town to conduct a furniture business of which he was also proprietor, the place at which his wife continued to reside was defendant's 'house or usual abode' during the period of his absence (according to Lovin v. Hicks) where defendant voted there in elections taking place during his period of absence, the presumption that a married man's usual place of abode was where his wife resided not having been rebutted. To similar effect are Missouri, K & T Trust Co. v. Norris, 61 Minn. 256, 63 N. W. 634 and Kueffner v. Gottfried 154 Minn. 70, 191 N. W. 271 (1922).
>
> Similarly it has been held that where a husband left his family home without clear evidence of intention to establish a domicil elsewhere, other than an inference which might be drawn from the fact that he may have been seeking to avoid an action at law against him, the family home continued as the husband's dwelling house. In Second National Bank v. Gardner 171 Pa. 267, 33 A. 188 (1895), an action by a bank against defendant cashier to recover funds allegedly wrongfully taken by the defendant, it was held that service by leaving process with the defendant's wife at his home was valid under a statute authorizing such service at defendant's dwelling house, even though it appeared that the defendant left his house to avoid defending the action brought against him, the court stating that although defendant had gone away, leaving his family in his residence, there was no evidence of his intention to acquire a new domicil and no evidence that he had acquired one, the only negation of intention to return being an inference from the circumstances, drawn by his wife,

> who nevertheless expressly admitted that she had no information from him on the subject.

This decision is also quite similar to the case at bar.

> Where a defendant left his home to go on an extended ocean voyage to South America, ostensibly because of ill health, leaving his wife behind, service by leaving a copy of process with the wife was held valid in Northwestern & P. Hypotheek Bank v. Ridpath, 29 Wash. 687, 70 P. 139 (1902). This was under a statute authorizing substituted service by leaving a copy of process at defendant's house of usual abode, notwithstanding it appeared that defendant had entertained some thoughts of not returning, but the final decision to locate elsewhere was reached after the service of process had been made.

There are cases in the annotation which hold that the place from which the defendant departed was not his place of residence based upon a finding that the person did not intend to return which was supported by the evidence, notwithstanding that the person left his family or parents at the original place. But in the present case it is important to note that the defendant had not been gone for a long period of time and there was no basis for inferring that he had established a place of residence at some other place. He merely said that this was no longer his abode and that is not enough. It must be shown that there has been the establishing of a new abode and he has the burden of establishing this, according to the cases. The presence of his family in Rock Springs certainly carries a good deal of weight in that it supports a conclusion that the Truman Street house was his usual place of abode, particularly in view of the fact that he had been gone for such a short time and was very likely seeking to avoid service of process.

WAS THE STATUTE TOLLED?

This case is factually similar to the Wyoming court's decision in Tarter v. Insco, 550 P. 2d 905 (Wyo. 1976). However, there the defendant could have been served by leaving a copy of the summons and complaint with the Secretary of State. The court said that her absence from the state did not toll the statute of limitations. The court's comments on the policy of the statute are pertinent:

> There can be no reason for a tolling statute except where service is impossible or unusually difficult. It would be inequitable to allow a defendant to escape service through trickery or concealment. The need and reason for a tolling statute fails where there is another readily available method of service.

In the present case service was unusually difficult. It is a proper case for invoking the tolling statute. Section 1-3-116, Wyoming statutes, Absence from state or abscondence or concealment, states that the limitations provision does not begin to run until he comes back into the state and is tolled while he is absconded on concealed.

The defendant was either absent from the state, absconded, concealed or all three. In any case the statute of limitations did not run while he was absent, absconded or concealed.

The plaintiff has the burden of proof as to absence, but this fact has been proven. Unquestionably the defendant was missing during the time that the effort was being made to serve him. During that time the City of Rock Springs was served and the sheriff attempted to serve defendant on more than one occasion. The plain-

tiff's effort to locate him was conscientious and extensive but it was to no avail.

In sum we conclude that the Sept. 4, 1980 service was valid. Wyoming Rules of Civil Procedure provide that service can be made by handing the summons and complaint to the defendant personally or by leaving copies at his dwelling house or usual place of abode with some member of his family.

The summons and complaint was left at defendant's usual place of abode with some member of his family. He says that he was separated. There was however no legal separation on record. This was not lie but it was a temporary expedient. The cases construe the term "usual place of abode" broadly. Even after the individual has departed it continues to be his usual place of abode. This is especially true where, as here, his wife and children continue to live there and he communicates with them at that place. His wife acknowledged that he called and talked to his son.

An implied abandonment would have to be proven by the defendant. No such evidence has been presented. From the evidence and law 938 Truman Street continued to be his "usual place of abode". The consequence is that service was completed on September 4, 1980, well within the statutory time. Hence the service was good.

The same result is reached when the tolling statute is applied. Here the question is whether Cantrell absconded, departed from the state or was secreted. We say that all three standards were satisfied. He was being sued for millions of dollars. A strong escape motive was present.

Does the Wyoming saving statute or clause apply? Section 1-3-118, Wyoming Statutes.

The statute in question is designed to provide relief where an action has been commenced in due time but a judgment for the plaintiff is reversed or the plaintiff fails otherwise than upon the merits and the time limit for the commencement of the action has expired at the date of the reversal or failure, the plaintiff, or his representatives if he dies and if the cause of action survives, may commence a new action within one (1) year after the date of the failure or reversal. This provision also applies to any claim asserted in any pleading by a defendant. So, what it does is provide the party with a one year period in which to refile the case after the dismissal of the case or its reversal. The argument of the appellant is that even if service upon Cantrell was insufficient, dismissal of the claim with prejudice would not be appropriate. Her argument is that the Wyoming saving statute described above would allow refiling within one year.

This type of statute is almost universally employed. Numerous states have adopted some species of this saving statute. Therefore there is a good deal of litigation which deals with it. This is not a new provision; it has been adopted by a good many states, including Wyoming, but also including New York. It is an equitable provision which seeks to give a litigant who has brought the suit in due time within the statute of limitations an opportunity to refile the case where he has failed through no particular fault of his own. The philosophy behind it is very well enunciated in Gaines v. City of New York, 109 N. E. 594 (1915). The statute is very similar to that

which is enforced in Wyoming. The opinion by Mr. Justice Cardozo gives a general description of the statute in 109 N. E. at 596 as follows:

> That the plaintiff's case is within the letter of the statute is hardly doubtful. He brought an action against the defendant, and the action was terminated otherwise than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute, or a final judgment upon the merits. If the protection of the statute is to be denied to him, it ought to be clearly shown that his case, though within the letter of the statute, is not within its reason. We think that the defendant has been unable to sustain that burden. *The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by a narrow construction.* The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts. When that has been done, a mistaken belief that the court has jurisdiction stands on the same plane as any other mistake of law. Questions of jurisdiction are often obscure and intricate. This very question of the power of the City Court to determine actions against the city of New York will illustrate that truth. O'Connor v. City of New York, 51 Misc. Rep. 560, 101 N. Y. Supp. 295; Id., 191 N. Y. 238, 83 N. E. 979. There is nothing in the reason of the rule that calls for a distinction between the consequences of error in respect of the jurisdiction of the court and the consequences of any other error in respect of a suitor's rights. (emphasis supplied.)

There had been a failure of jurisdiction and that's why it was started over again and the court held that although the defendant argued that an action dismissed for want

of jurisdiction was a nullity, that this is an extreme view and was inapplicable to the case. But the opinion explained that even where the jurisdiction fails the court has not lost all of its power to deal with the case. It is not dead. Mr. Justice Cardozo brought out that the statute, i.e. of limitations, was expanded though the earlier action was dismissed for lack of jurisdiction, either of the subject matter or of the person.

Whether the Wyoming statute is applicable to a fact situation in which jurisdiction is involved?

The 1905 decision of the Supreme Court of Wyoming in Clause v. Columbia Savings & Loan Ass'n. is not dissimilar from our case. There was a defect in the service which was said to render it invalid on a jurisdictional basis. The court said that the irregularity or imperfection of the service thereof in order to deprive the court of jurisdiction must render the summons or the service so defective that a collateral impeachment is available and a service of process by the coroner not authorized to do so under the specified circumstances is not void, only voidable. The court nevertheless has jurisdiction. In this instance the service was quashed. But it was said that the plaintiff was entitled to proceed under the then statute, the saving statute was what it was, the § 3465 of the Wyoming Code, providing that where the plaintiff in an action commenced in time fails otherwise than on the merits he may commence a new action within one year thereafter. In this case the bar of limitations is not applicable. This is virtually the same statute that is on the Wyoming books at the present time and which we have referred to as the saving statute.

The court described the contention as being that the action was not commenced within five years for the reason that the service of summons issued upon the petition filed having been quashed because it was improperly directed to and served by the coroner instead of the sheriff, the service of summons was not sufficient for the commencement of the action within the meaning of the statute as applied in the limitation of action. The contention was that the summons was void and the service quashed. The action cannot be deemed to have commenced with its issuance (the summons) and therefore that it was not commenced within three months after rejection of the claim by the administrator. Under the special statute the suit was barred before a valid summons was issued.

Another question considered was whether the filing of the complaint and the issuance of the summons, which was afterwards quashed, operated to commence the action so as to render applicable the statutory provision referred to, i.e. the saving clause. Within the meaning of the limitation statute is a clear quote: "an action shall be deemed commenced as to each defendant at the date of the summons which is served upon him or on a co-defendant who is a joint contractor or otherwise united in interest with him." This is a statute very similar to that which is now being brought into play. The court said that there was a failure of the cause within the meaning of § 3465, a failure by the plaintiff, otherwise than upon the merits, in an action commenced in due time so as to authorize bringing a new action within one year after the date of such failure. The court said that

the service of summons by the coroner caused the action to have been commenced. The court added:

> "the mere fact that the service was quashed does not determine the question for it is not every irregularity or imperfection in the summons or the service thereof which will deprive the court of jurisdiction. It may justify or require the setting aside of service upon motion or the reversal of the judgment upon a proper application. To have the effect of failing to give jurisdiction, the summons or service must be so radically defective that it would authorize a collateral impeachment of a judgment rendered on; that is to say it must be void and not merely voidable.

We hold that based upon the teaching of the Clause decision even if further service is necessary, the service of Sept. 4, 1980 at the abode of the defendant was not invalid and certainly was not void. Based upon that fact, the statute as to departure from the state, abscondence or concealment must be tolled in view of the avoidance antics of the defendant. The action was commenced. In our judgment the Clause v. Columbia Savings & Loan Ass'n, though old, is a solid opinion and governs the saving clause problem that is here present.

An extensive annotation is found in 6 ALR 3rd 1043, etc. and more particularly at 1047. The heading of the specific part of it is Rule that Renewal Statute is Applicable, § 3. The authors describe a vast number of cases under the following introductory statement:

> According to what appropriately may be called a majority rule, renewal statutes, i. e. statutes permitting the reinstituting of suits disposed of on grounds not affecting the merits, are applicable to suits dismissed because of lack of jurisdiction. The following cases

recognize the above rule either by their holdings or by statements to such effect.

Numerous cases set forth are state as well as federal courts. Particular attention is given to Gaines v. New York, the opinion of the New York Court of Appeals, which is set forth above.

An early Massachusetts case should be noted, Woods v. Houghton, 67 Mass. (1 Gray) 580 (1854). In that case the savings clause held to apply so as to entitle plaintiff who had commenced a trustee process in the wrong county whereby the case was dismissed to bring a new action in the proper county, the court stating that the real intent and meaning of the statute was that where a plaintiff has been defeated by some matter not affecting the merits—some defect or informality which he could remedy or avoid by a new process—the limitation statute would not be a bar to a new action commenced within the time designated in the renewal statute. This ancient case sets forth the rule in exact terms.

In conclusion are (sic) view is that it would be a terrible injustice if this case were to be dismissed based upon the service on the defendant being void, particularly in view of the conscientious efforts which were given to the serving. It would result in a principle which approves shooting and killing a human being and then escaping from liability avoiding being served with process, it means that an empty procedural incident can completely dispose of a case and deprive the injured party from her day in court. We conclude that regardless of the approach in this kind of situation the plaintiff in these circumstances is entitled to an opportunity to present her case. It is with that in

mind that we must disagree with the decision of final dismissal by the trial court. We remand the cause for a trial.

THE CIVIL RIGHTS CLAIMS

Immunity of the City.

The trial court concluded that the City of Rock Springs was immune from any action under 42 U. S. C. § 1983 and on that ground dismissed Rock Springs from the lawsuit on the basis of Oroz v. Board of County Commissioners, 575 P. 2d 1155 (Wyo. 1978). In the past state immunity law extended to a city. This is no longer true. Monell v. Department of Social Services changed all of this. Monroe v. Pape, 365 U. S. 167 (1961) was overruled. The conclusion was that the state would no longer control immunity in a federal civil rights claim.[1] Martinez v. California, 444 U. S. 277 (1980). A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise. *Id.* footnote 8, 284. The decision of the Supreme Court in Owen v. City of Independence, 445 U. S. 622 (1980) has removed all doubt as to the sovereign immunity defense applying to municipalities. This was abrogated by the passage of § 1983. Accordingly the trial court must be reversed on this issue.

What about the applicability of state law defenses?

The City of Rock Springs' argument is that even if it is not immune, that an alternative ground exists which supports dismissal of the § 1983 claim. This derives from 42 U. S. C. § 1988 which allows state law to govern civil

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1. Monell predates the incident which is present in this case.

rights suits where no federal law applies. The City's contention is that because the appellant Rosa, prior to the filing of this lawsuit, had sought and received a settlement of over $59,000 from the state's Workers' Compensation Fund, she is not entitled to further relief from the City. Wyoming Statute § 27-12-103 provides that acceptance of workmen's compensation is "in lieu of all other rights and remedies against any employer making contributions required by the act; or his employees acting within the scope of their employment unless the employee was culpably negligent." Rosa did accept such a settlement and the question is whether she is barred. The text of 42 U. S. C. § 1988 is set forth in a footnote below.[2]

The Supreme Court has considered and has interpreted § 1988 in the case of Moor v. County of Alameda, 411 U. S. 693, 702 (1973). The Supreme Court said:

> [T]he section is intended to complement the various acts which do create federal causes of action for the violation of federal civil rights. . . . But inevitably existing federal law will not cover every issue that may arise in the context of a federal civil rights action. Thus, § 1988 proceeds to authorize federal courts, where federal law is unsuited or insufficient

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2. The jurisdiction in civil . . . matters conferred on the district courts by [the Civil Rights Acts] . . . , for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect, but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . , the common law as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

> 'to furnish suitable remedies; to look to principles of the common law, as altered by state law, so long as such principles are not inconsistent with the Constitution and laws of the United States.'

The courts are faced with the necessity for resolving inconsistency between state and federal law under § 1988. The courts must look not only at particular federal statutes and constitutional provisions, but also at "the policies expressed in them." Robertson v. Wegmann, 436 U. S. 584 (1978). An important aspect is whether the application of state law would be inconsistent with the federal policy underlying the cause of action under consideration. *Id.* at 590.

Is there an undermining of federal policy present in the instant case?

The answer is yes. To allow defendants here to escape liability by relying on state law defenses certainly interferes with the basic social policy which favors the enforcement of federal civil rights and it would also interfere with the policy of preventing abuses of power by those acting under color of state law. Robertson v. Wegmann, *supra*, at 591. There should be resort to state law only where the federal procedures or remedies are inadequate to provide relief. In the present case, if the plaintiff prevails at the trial, § 1983 would provide the appropriate relief. Application of the defenses urged by the defendant, however, would do away with any such relief.

The exclusive remedy of state Workers' Compensation statutes does not bar recovery against an employer under § 1983. Hutchings v. Erie City and County, 516 F. Supp. 1265 (W. D. Pa. 1981); Walker v. Rowe, 535 F. Supp. 55 (N. D. Ill. 1982). In *Walker* the court said: "The

state statute upon which defendants rely, however, does not and could not preclude the vindication of plaintiff's constitutional rights in a federal form." *Id.* at 57.

The simple answer to the defendant's argument that Rosa's acceptance of Workers' Compensation bars any recovery under § 1983 because the state has pronounced workmen's compensation to be an exclusive is that the state law conflicts with the remedy provided by § 1983 and therefore it must be superseded in this lawsuit. The trial court did not address either of these issues but relied solely on the immunity proposition applying to the City. Our conclusion is that the state law defenses do not absolve the defendants of liability. It follows that the court's action in dismissing the City must be reversed.

We now address the second matter raised and that is the failure to give notice under the state law. District courts have consistently held that state notice of claim requirements do not apply in § 1983 suits. Glover v. City of New York, 401 F. Supp. 632 (E. D. N. Y. 1975); Perrote v. Percy, 452 F. Supp. 604 (W. D. Wisc. 1978); Williams v. Posey, 475 F. Supp. 133 (M. D. Ga. 1979). The state should not be allowed to impose a condition precedent on the right to bring a § 1983 action.

Does the plaintiff have standing to bring this action?

It is contended by the defendants that there exists no survival of a civil rights claim and that the personal representative of the decedent has no independent cause of action under § 1983. Therefore, the argument goes, Rosa's § 1983 claim should have been dismissed by the court for failure to state a claim. Cantrell maintains that

Wyoming only allows wrongful death damages in a suit of this nature and these are damages incurred after the decedent's death. Inasmuch as in the constitutional violation Rosa seeks to be compensated for damages which occurred when her husband Rosa was alive. Cantrell's argument goes that Wyoming will not permit a decedent's representative to obtain constitutional damages under § 1983.

Section 1988, *supra*, governs the decision as to the survivorship rule which is applicable. Robertson v. Wegmann, 436 U. S. at 588. In view of the fact that federal law does not cover the issue of the survival of civil rights action under § 1983 following the death of the plaintiff, § 1988 gives authority to the courts to look to state law to determine which actions survive. Moor v. County of Alameda, 411 U. S. at 702. These state survival statutes must not, however, be inconsistent with the Constitution and laws of the United States. Robertson v. Wegmann, *supra*, at 590. There is a Wyoming statute which is applicable. It is § 1-4-101. It provides:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, injuries to the person, an injury to real or personal estate, or any deceit or fraud also survive. An action may be brought notwithstanding the death of the person entitled or liable to the same, but in actions for personal injury damages, if the person entitled thereto dies recovery is limited to damages for wrongful death.

Section 1-38-101 deals with actions for wrongful death which survive; and proceedings against executor or administrator of person liable. That statute states:

> Whenever the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action to recover damages if death had not ensued, the person who would have been liable if death had not ensued is liable in an action for damages, even though the death was caused under circumstances as amount in law to murder in the first or second degree or manslaughter. If the person liable dies, the action may be brought against the executor or administrator of his estate. If he left no estate within the State of Wyoming, the court may appoint an administrator upon application.

Section 1-38-102, Wyoming Statutes deals with action to be brought by personal representatives; recovery exempt from debts; measure and element of damages; limitation of action.

> (a) Every such action shall be brought by and in the name of the personal representative of the deceased person.
>
> (b) If the deceased left a husband, wife, child, father or mother, no debt of the deceased may be satisfied out of the proceeds of any judgment obtained in any action brought under the provisions of this Section.
>
> (c) The court or jury, as the case may be, in every such action may award such damages, pecuniary and exemplary, as shall be deemed fair and just. *Every person for whose benefit* such action is brought may prove his respective damages, and the court or jury may award such person that amount of damages to which it considers such person entitled, including damages for loss of probable future compansionship, society and comfort.
>
> (d) Every such action shall be commenced within two (2) years after the death of the deceased person.

The courts have begun to distinguish survival actions from wrongful death actions. They find that they are

distinct causes of action. *See* White v. B. K. Trucking Co., Inc., 371 F. Supp. 578 (W. D. Okla. 1974). A survival claim is based on the decedent's claim for damages sustained during his lifetime. On the other hand a wrongful death action creates a new claim or cause of action for the loss sustained by statutory beneficiaries of the decedent (directly from his death). The wrongful death claim then is distinct from any that the deceased might have had if he had lived. 42 ALR FED. 163, 165, Survival of Civil Rights Action. DeHerrera v. DeHerrera, 565 P. 2d 479 (Wyo. 1977).

What about the applicability of such a statute to a civil rights action pursuant to 42 U. S. C. § 1983?

The cases hold that the decedent's heirs are allowed to file a wrongful death action under § 1983 to recover for damages suffered by the heirs as a result of the death. Galindo v. Brownell, 255 F. Supp. 930 (S. D. Cal. 1966); Mattis v. Schnarr, 502 F. 2d 588 (8th Cir. 1974), on remand 404 F. Supp. 643, rev'd on other grounds 547 F. 2d 1007 (8th Cir.) vacated on other grounds 431 U. S. 171; Smith v. Wickline, 396 F. Supp. 555 (Okla. 1975); Pollard v. United States, 384 F. Supp. 304 (M. D. Ala. 1974).

Authorities which hold that civil rights actions for damages suffered by the decedent survive the death of the injured party are Salazar v. Dowd, 256 F. Supp. 220 (D. C. Colo. 1966); Landrum v. Moats, 576 F. 2d 1320 (8th Cir. 1978) (Nebraska law); Hall v. Wooten, 506 F. 2d 564 (6th Cir. 1974) (Kentucky law); Spence v. Staras, 507 F. 2d 554 (7th Cir. 1974) (Illinois law); Troutman v. Johnson City, 392 F. Supp. 556 (E. D. Tenn. 1973); Beard v. Robinson, 563 F. 2d 331 (7th Cir. 1977). A Fifth Circuit

case, Brazier v. Cherry, 293 F. 2d 401 (5th Cir. 1961) held that an action against the Georgia police officers for the wrongful death of the deceased allegedly resulting from violations of § 1983 gave rise, by virtue of the Georgia survival statute, to a federally enforceable claim for damages during his lifetime and by his survivors. The court said:

> To make the policy of the Civil Rights Statutes fully effectual, regard has to be taken of both classes of victims. Section 1988 declares that this need may be fulfilled if state law is available. *Id.* at 409.

There do not appear to be any Wyoming cases which interpret the state survival or wrongful death statutes pursuant to § 1983. Nevertheless the supreme court of Wyoming has held that in a state court action where a decedent's death is due to the wrongful injuries, suit is permitted under either the survival statute or the wrongful death statute but not both. Parsons v. Roussalis, 488 P. 2d 1050 (Wyo. 1971). This ruling was based on the court's interpretation of the survival statute § 1-28, W. S. 1957, which provides:

> In addition to the causes of action which survive at common law, causes of action . . . for *injuries to the person* . . . shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same provided that . . . if the person otherwise entitled thereto, dies, recovery shall be limited to damages for wrongful death. (Emphasis added).

In the plaintiff's complaint there are four claims: (a) wrongful death-negligence; (b) survival action for personal injury; (c) breach of express contract, and (4)

breach of implied warranty. The court in disallowing one cause of action said:

> While we can fully agree that by the amendment in 1947 the legislature effectively permitted a cause of action for personal injuries to survive, we reject plaintiff's thesis that it meant to allow recovery under both the survival statute and the wrongful death act. Where a decedent's death is due to wrongful injuries, suit is permitted under either § 1-28 or §§ 1-1065 and 1-1066; but recovery is limited to that stemming from wrongful death—pain and suffering of the decedent, according to the words of the statute, having no part in establishing damages. *Id.* at 1052.

The interpretation given in Parsons, *supra*, was reaffirmed in DeHerrera v. DeHerrera, 565 P. 2d 479 (Wyo. 1977). The Wyoming supreme court in that case interpreted the survival statute and held that an action for personal injuries survived after the injured party died of an illness unconnected with defendant's alleged negligence. The *DeHerrera* opinion criticized the ruling in *Parsons* in referring to the Kansas case of Prowant v. Kings-X, Inc., 1959, 184 Kan. 413, 337 P. 2d 1021, the Wyoming court said:

> . . . Thus was reached the same result we visualize exists in Wyoming by virtue of § 1-28, as interpreted by *Parsons*, along with our own holding here. The personal injury survival statute in Kansas had no such proviso as in §1-28 but the court, by judicial interpretation, construed its wrongful death act to be exclusive remedy if death ensued as a result of the negligence and the survival statute to apply if there was no death caused by the other. The court did there, by judicial fiat, what the Wyoming legislature has done by statute. The Kansas court later, on rehearing, in Prowant v. Kings-X, Inc., reversed itself and concluded that the survival statute means what

> it says and allows a recovery on behalf of the estate for its losses, separate and apart from the wrongful death act.

In 1977 the Wyoming statute was amended. It states as follows:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, injuries to the person, an injury to a real or personal estate, or any deceit or fraud also survive. An action may be brought notwithstanding the death of the person entitled or liable to the same, but in actions for personal injury damages, if the person entitled thereto dies recovery is limited to damages for wrongful death.

From a reading of the statute it would appear that it is a clarification and reaffirmation of the previous law.

Inasmuch as the allegations in Rosa's complaint survive her husband's death and seek damages for deprivation of the civil rights, it might be argued that it is a different claim from that for personal injuries.

The defendant has one further contention. His position is that the trial court erred in applying Fed. R. Civ. P. 3 in determining whether the § 1983 complaint was time barred by Wyoming's two year statute of limitations. In view of the determinations which we have made with respect to the service of process and considering our conclusion in that, the service at the defendant's abode on September 4th was valid. The fact that this was the last address that defendant had in Rock Springs and he resided there and his absence was for such a short period of time and his family remained at the Truman Street address during all of this time, his wife was in touch with him during this period and in view of the rulings which

we have made with respect to the tolling statute, it is our conclusion that this issue is moot and is governed by our ruling with respect to the validity of the service under state rules. Therefore, the decision of the Supreme Court in Walker v. Armco, *supra*, does not come into play here.

In sum the judgment of the district court must be reversed in part 1 of the decision supra. We determined that the Hanna v. Plummer, *supra*, doctrine did not apply to this case and we stand by that. However, we have concluded that even under state law the service was entirely valid and so there is really no issue as between Hanna v. Plummer, *supra*, the federal rule of procedure, and Walker v. Armco Steel Corp., *supra*, because even under state law the service was valid. It gave the defendant notice. True it eliminates the gamemanship (sic) with respect to the statute of limitations. We have also ruled that the savings clause and the attempted service tolled the statute. We further rule that the City of Rock Springs is not immune from liability under § 1983. The order of dismissal must be therefore reversed. We further rule that the state law defenses of payment and failure to file notice of claim are inapplicable in § 1983 actions. We also concluded that the plaintiff Rosa clearly has standing to bring the wrongful death claim in connection with § 1983 of the Federal Civil Rights Code.

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42 U. S. C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R. S. § 1979.

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42 U. S. C. § 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

R. S. § 722.

Wyoming Rules of Civil Procedure

Rule 3. Commencement of action.

(a) *How commenced.* — A civil action is commenced by filing a complaint with the court.

(b) *When commenced.* — For purposes of statutes of limitation, an action shall be deemed commenced on the date of filing the complaint as to each defendant, if service is made on him or on a co-defendant who is a joint contractor or otherwise united in interest with him, within sixty (60) days after the filing of the complaint. If such service is not made within sixty (60) days the action shall be deemed commenced on the date when service is made. The voluntary waiver, acceptance or acknowledgment of service, or appearance by a defendant shall be the same as personal service on the date when such waiver, acceptance, acknowledgment or appearance is made. When service is made by publication, the action shall be deemed commenced on the date of the first publication.

Wyo. Stat. § 1-4-101. Causes of action that survive.

In addition to the causes of action which survive at common law, causes of action for mesne profits, injuries to the person, an injury to real or personal estate, or any deceit or fraud also survive. An action may be brought notwithstanding the death of the person entitled or liable to the same, but in actions for personal injury damages, if the person entitled thereto dies recovery is limited to damages for wrongful death. (Laws 1886, ch. 60, § 28; R.S. 1887, § 2364; R.S. 1899, § 3447; C.S. 1910, § 4290; C.S. 1920, § 5559; R.S. 1931, § 89-402; C.S. 1945, § 3-402; Laws 1947, ch. 124, § 1; W.S. 1957, § 1-28; Laws 1977, ch. 188, § 1.)

Wyo. Stat. § 1-3-115. Liability created by federal statute.

All actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which

no period of limitations is provided in such statute, shall be commenced within two (2) years after the cause of action has accrued. (Laws 1943, ch. 77, § 1; C.S. 1945, § 3-511; W.S. 1957, § 1-23; Laws 1977, ch. 188, § 1.)

Wyo. Stat. § 1-3-116. Absence from state, abscondence or concealment.

If a cause of action accrues against a person when he is out of the state, or has absconded or concealed himself, the period limited for the commencement of the action does not begin to run until he comes into the state or while he is so absconded or concealed. If after the cause of action accrues he departs from the state or absconds or conceals himself, the time of his absence or concealment is not computed as a part of the period within which the action shall be brought. (Laws 1886, ch. 60, § 42; R.S. 1887, § 2378; R.S. 1899, § 3463; C.S. 1910, § 4307; C.S. 1920, § 5576; R.S. 1931, § 89-418; C.S. 1945, § 3-519; W.S. 1957, § 1-24; Laws 1977, ch. 188, § 1.)

Wyo. Stat. § 2-14-201. Liability for damages for death caused by wrongful act, etc.; right generally.

Whenever the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action to recover damages if death had not ensued, the person who would have been liable if death had not ensued is liable in an action for damages, even though the death was caused under circumstances as amount in law to murder in the first or second degree or manslaughter. If the person liable dies, the action may be brought against the personal representative

of his estate. If he left no estate within the state of Wyoming, the court may appoint a personal representative upon application. (C.L. 1876, ch. 39, § 1; R.S. 1887, § 2364a; R.S. 1899, § 3448; C.S. 1910, § 4291; C.S. 1920, § 5560; R.S. 1931, § 89-403; C.S. 1945, § 3-403; Laws 1947, ch. 95, § 1; W.S. 1957, § 1-1065; Laws 1977, ch. 188, § 1; W.S. 1977, § 1-38-101; Laws 1979, ch. 142, § 3; 1980, ch. 54, § 1.)

Wyo. Stat. § 2-14-202. Same; action to be brought by personal representative; recovery exempt from debts; measure and element of damages; time limitation.

(a) Every such action shall be brought by and in the name of the personal representative of the deceased person.

(b) If the decedent left a husband, wife, child, father or mother, no debt of the decedent may be satisfied out of the proceeds of any judgment obtained in any action brought under the provisions of this section.

(c) The court or jury in the action may award such damages, pecuniary and exemplary, as it deems fair and just. Every person for whose benefit the action is brought may prove his respective damages and the court or jury may award the person that amount of damages to which it considers the person entitled, including damages for loss of probable future companionship, society and comfort.

(d) Every such action shall be commenced within two (2) years after the death of the deceased person.

Office-Supreme Court, U.S.
FILED
AUG 22 1983

No. 82-1948

In The

Supreme Court of the United States

October Term, 1982

ED CANTRELL,

Petitioner,

vs.

REBECCA L. ROSA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL ROSA, DECEASED,

Respondent.

BRIEF IN OPPOSITION

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PREFACE

The issues decided by the United States Court of Appeals for the Tenth Circuit, and which the plaintiff seeks to have reviewed by this Court were before the Circuit Court pursuant to the provisions of Rule 54(b), Federal Rules of Civil Procedure[1] and pursuant to the provisions of 28 U.S.C. § 1292(b).[2] Both the petitioner and the respondent made interlocutory appeals for the purposes of having the Court of Appeals consider certain important issues of law before the case proceeded on the merits. Today, the case still is stayed, and no proceeding on the merits have occurred.

It is important also that the trial court, even though it had dismissed Count I of the complaint against the petitioner, which was a wrongful death claim brought under the diversity jurisdiction of the court, denied the motion to dismiss the second count, which was a civil rights claim, which had been brought under the federal question jurisdiction of the court. That finding by the trial court was affirmed by the Court of Appeals. Thus, even if the Court of Appeals had affirmed the dismissal of Count I, the petitioner was still obligated to respond to the second claim.

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[1]App., 1
[2]App., 2

ARGUMENT

There are compelling reasons why the court should deny the Petition for a Writ of Certiorari. First, none of the issues which the petitioner seeks to have reviewed fall within the parameters of Rule 17, Revised Rules of the Supreme Court of the United States,[3] or within the teachings of the opinions of this court. Secondly, the Court of Appeals did not abuse its discretion in reversing the trial court's order dismissing the wrongful death claim. Lastly, the matters sought to be reviewed were before the Circuit Court on interlocutory appeal.

I. There are no special or important reasons presented which merit granting the Writ of Certiorari.

The decision of the Court of Appeals which the petitioner seeks to have reviewed is not one which is in conflict with the decisions of any other courts of appeal. Neither is the decision in conflict with any opinion of the Supreme Court of Wyoming where matters of state law are involved, nor is the decision in conflict with any of the decisions of this court.[4]

While the issues the petitioner raises have importance for the parties, they do not involve questions of gravity and general importance for the public. Under such circumstances, this court has refused to grant certiorari.[5] When this fact is coupled with the fact the petitioner has failed to show the existence of any conflict between the decision it seeks to have reviewed and the decisions of the Wyoming Supreme Court or

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[3]App., 3
[4]Rule 17, Revised Rules of the Supreme Court of the United States
[5]NLRB v. Pittsburg S.S. Co., 340 U.S. 498 (1951)

of any other federal courts, an additional reason exists for denying the petition.[6]

The petitioner has argued that two important federal questions exist which should be addressed. One is the extent to which a state statutory limitation scheme must be adopted for actions brought under 42 U.S.C. 1983. The other issue of importance, the petitioner contends, is whether the plaintiff has a valid claim under 42 U.S.C. § 1983. While these two arguments may have apparent academic appeal, they are not issues which have posed problems for either the federal trial courts or the federal courts of appeal. Both levels of court have held federal rules of procedure, not state rules, determine when an action brought under 42 U.S.C. § 1983 is deemed to have commenced.[7]

Similarly, both the trial courts and the courts of appeal have recognized that a person in the respondent's position may assert a valid claim under 42 U.S.C. § 1983.[8] The case law is clear that a § 1983 action may be stated by relying upon a state's wrongful death statute.[9]

Neither has the petitioner shown in its petition the existence of any conflict among the lower courts on either of these two issues. Nor has the petitioner cited any authority which supports its contention that 42 U.S.C. § 1988 requires the adoption of a state procedural scheme concerning the

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[6]Fields v. United States, 205 U.S. 292 (1907)

[7]Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958); Bomar v. Keyes, 162 F.2d 136 (2nd Cir. 1947), cert. denied, 332 U.S. 825, reh. denied, 332 U.S. 845 (1947); United States v. Malkin, 317 F.Supp. 613 (E.D.N.Y. 1970)

[8]Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), cert. denied, 386 U.S. 921 (1961); Baffa v. Black, 481 F.Supp. 1083 (E.D. Pa. 1979)

[9]Galindo v. Brownell, 255 F.Supp. 930 (S.D. Cal. 1966); Smith v. Wickline, 396 F.Supp. 555 (W. D. Okla. 1975)

commencement of an action which is brought under the federal question jurisdiction of the court. Properly, these matters should first be dealt with at the trial court and appellate court level. They are not of such importance that this court should review the matters at this time. While the two issues are, perhaps, of academic or episodic interest, they are not sufficient to support a granting of a writ of certiorari.[10]

II. There has been no abuse of appellate powers.

The real thrust of the petitioner's argument in support of the granting of a writ of certiorari is that the appellate court abused its discretion in reversing the trial court's ruling which had dismissed the respondent's wrongful death claim. The petitioner contends that the court of appeals made findings unsupported by the record and contrary to the findings of the district court on issues not raised by the parties. This simply is not so.

The circuit court stated three distinct and cogent reasons for reversing the trial court as to its legal conclusion for dismissing the wrongful death claim of the respondent's complaint. The trial court had held that, as a matter of law, there had been no service upon the petitioner so that the court failed to acquire jurisdiction before the statute of limitations ran. Considering the same facts which were before the trial court, either by way of the pleadings or by way of affidavits, the circuit court simply reached a different legal conclusion. The circuit court is not required to give any specific weight to the trial court's conclusions of law. Rather, it is the appellate court's duty to determine if the correct rule of law has been applied to the facts as found.[11] Simply, the appellate

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[10]Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955)
[11]Campana Corp v. Harrison, 114 F.2d 400 (7th Cir. 1940)

court reached different legal conclusions when it applied to the facts the same body of Wyoming law which the trial court had considered.

The appellate court concluded, first, that the service made on the petitioner was effective. That was a legal conclusion, not a factual finding. Secondly, the appellate court found that the facts and circumstances were such to permit Wyoming's Tolling Statute,[12] to come into play. Whether the tolling statute should apply is also a legal conclusion and a conclusion which the appellate court is entitled to make under the rules.[13] Finally, the appellate court also concluded as a matter of law that the Wyoming Savings Statute[14] applied and relied upon Wyoming case law to support its legal conclusion.[15]

The Court of Appeals has concluded that the trial court improperly applied state law. The petitioner contends that the trial court did not, and that the court of appeals erred in reversing the trial court. This question is simply not of the gravity and importance that it requires review by the Supreme Court of those conclusions of the Circuit Court of Appeals.[16]

Most importantly, the court should deny the petition for a writ of certiorari because the petition seeks a review of the decree of the Court of Appeals on appeal from an interlocutory order.[17] Since both the trial court and the appellate court agreed that the plaintiff had stated a claim against the

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[12]Wyo. Stat. § 1-3-116
[13]Rule 52(b), Federal Rules of Civil Procedure
[14]Wyo. Stat. § 1-3-118
[15]Clause v. Columbia Savings and Loan Assoc., 16 Wyo. 450, 95 P. 54 (1908)
[16]Re Woods, 143 U.S. 202 (1892)
[17]American Const. Co. v. Jacksonville T & KWR, Co., 148 U.S. 372 (1893)

defendant under 42 U.S.C. § 1983, the petitioner was still required to respond to the complaint. Thus, there certainly does not exist, and the petitioner has failed to show the existence, of the necessity to grant the petition for certiorari in order to prevent extraordinary inconvenience or embarrassment in the conduct of the case.[18]

[18]American Const. Co. v. Jacksonville T & KWR Co., *supra*

CONCLUSION

The petitioner has failed to show that the issues it seeks to have reviewed satisfy the requirements both of Rule 17, Revised Rules of the Supreme Court of the United States and of the opinions of this court. Although the issues raised have importance to the parties, particularly to the petitioner, they do not involve matters of broad public interest. More importantly, the court of appeals has not departed so far from the accepted and usual course of judicial proceedings, despite the petitioner's argument, which would require this court to exercise its power of supervision. The court of appeals has simply reached a conclusion of law on one point which differs from the conclusion reached by the trial court. Most importantly, the decree of the court of appeals which the petitioner seeks to have reviewed is a decree arising out of an interlocutory appeal. This fact, when considered with all of the other arguments raised by the respondent requires that the petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George A. Zunker, the attorney for Respondent herein, hereby certify that on the 19th day of August, 1983, I served copies of the foregoing Brief in Opposition on the parties hereto as follows:

1. On Petitioner, by mailing copies in a duly addressed envelope, with first-class postage prepaid, to Mr. Eugene S. Hames, Wood, Ris & Hames, P.C., 1100 Denver Club Building, 518 Seventeenth Street, Denver, Colorado 80202.

2. On respondents Callas, Bider and the City of Rock Springs, by mailing copies in a duly addressed envelope, with first-class postage prepaid, to Glenn Parker, Hirst & Applegate, Boyd Building, Cheyenne, Wyoming 82001.

/s/GEORGE A. ZUNKER
ATTORNEY FOR RESPONDENT
ROSA

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

The foregoing Certificate of Service was acknowledged to before me by GEORGE A. ZUNKER this 19th day of August, 1983.

Witness my hand and official seal.

/s/KELLIE A. ERICKSON
NOTARY PUBLIC

My Commission Expires: September 11, 1983

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 17. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Office-Supreme Court, U.S.
FILED
SEP 8 1983
ALEXANDER L. STEVAS,

No. 82-1948

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ED CANTRELL,

Petitioner,

vs.

REBECCA L. ROSA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL ROSA, DECEASED,

Respondent.

RESPONSE OF CITY OF ROCK SPRINGS, MATT BIDER AND JAMES CALLAS TO ED CANTRELL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

The City of Rock Springs, Matt Bider and James Callas agree that Petitioner has presented the questions which this Court should review, namely:

1. Did the United States Tenth Circuit Court of Appeals abuse its judicial function in reversing factual findings of the District Court and by making its own factual findings which were not supported by the record?

2. When a State Statute of Limitations is adopted for use under a Federal statute, must a Court also adopt the State statutory scheme for tolling the Statute of Limitations?

3. Does a Plaintiff suing for wrongful death damages she sustained due to the death of her husband have a cognizable claim under 42 U.S.C. §1983?

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No. 82-1948

IN THE

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REBECCA L. ROSA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL ROSA, DECEASED,

Respondent.

RESPONSE OF CITY OF ROCK SPRINGS, MATT BIDER AND JAMES CALLAS TO ED CANTRELL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS

PARTIES TO THE PROCEEDINGS

Respondent, Rebecca L. Rosa, as Personal Representative of the Estate of Michael Rosa, Deceased, pursuant to Letters of Administration issued in the State of Colorado, was Plaintiff in the District Court. Defendants in that Court were Ed Cantrell, Public Safety Director of the City of Rock Springs, the City of Rock Springs, Matt Bider, James Callas, City police officers, and a number of other Defendants, who were dismissed in the District Court by stipulation.

The City of Rock Springs, Matt Bider and James Callas, having been requested to respond to the Petition for Writ of Certiorari in this Court, adopt by reference the Petitioner's questions presented for review, Petitioner's statement of jurisdiction, statement of the case, appendices and the text of authorities,[1] but specifically request that the Court consider their supplemental argument on the third question presented for review, namely:

> "Does a plaintiff suing for wrongful death damages she sustained due to the death of her husband have a cognizable claim under 42 U.S.C. §1983?"

SUPPLEMENTAL ARGUMENT ON THIRD QUESTION PRESENTED FOR REVIEW, "DOES A PLAINTIFF SUING FOR WRONGFUL DEATH DAMAGES SHE SUSTAINED DUE TO THE DEATH OF HER HUSBAND HAVE A COGNIZABLE CLAIM UNDER 42 U.S.C. §1983?"

This question in the case, which is one of paramount interest, especially vital to the City of Rock Springs and its officers, was not satisfactorily answered by the Circuit Court, but was actually by-passed with the ambiguous statement that:

> "Inasmuch as the allegations in Rosa's Complaint survive her husband's death and seek damages for deprivation of the civil rights, it might be argued that it is a different claim from that for personal injuries." (Petitioner's Appendix p. 43)

Could Plaintiff Rosa have a cognizable claim for *damages she sustained personally* because of the violation of another's right under 42 U.S.C. §1983? It is submitted that she could not. If the constitutional rights of anyone were violated, they were those of decedent Rosa, not those of Plaintiff. One may

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[1]Subject to corrections — "Bider" for "Binder" p. ii, "56 L.Ed.2d 554" for "56 L.Ed. 544" p. 6 and "81 L.Ed. 685" for "81 L.Ed.2d 685" p. 13.

not sue under 42 U.S.C. §1983 for deprivation of another's constitutional rights. *Javits v. Stevens,* 382 F. Supp. 131, 135 (S.D. N.Y. 1974); *O'Malley v. Brierley,* 477 F.2d 785 (3rd Cir. 1973); *U.S. v. Biloxi Municipal School District,* 219 F. Supp. 691 (S.D. Miss. 1963) affd. 326 F.2d 237 (5th Cir.) cert. den. 379 U.S. 929, 855 S.Ct. 324, 13 L.Ed.2d 341 (1924).

It is clear, as held in *Moor v. County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596, 606 (N 14) and repeated in *Robertson v. Wegmann,* 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554, 560, that one specific area not covered by Federal law is that relating to "the survival of civil rights actions under §1983 upon the death of either the plaintiff or defendant."

Since Federal common law does not allow recovery after death of an injured party, and any relief must be provided by legislation, the Federal Courts have allowed for the survival of such actions under the provision of 42 U.S.C. §1988, when the jurisdiction where the action arises provides for survival of actions. *Holmes v. Silver Cross Hospital of Joliet, Illinois,* 340 F. Supp. 125 (N.D. Ill. 1972); *Larson v. Wind,* 542 F. Supp. 25 (D. Kans. 1982); *Roberts v. Rowe,* 89 F.R.D. 398 (S.D. W.Va. 1981); *Brazier v. Cherry,* 293 F.2d 401 (5th Cir. 1961); *Hall v. Wooten,* 506 F.2d 564 (6th Cir. 1974); *Spence v. Staras,* 507 F.2d 554 (7th Cir. 1974); *Beard v. Robinson,* 563 F.2d 331 (7th Cir. 1977); 42 A.L.R.F. 163, 169.

Under the provisions of 42 U.S.C. §1988, as interpreted by this Court, and universally adopted in the Federal Court system, the present cause will be resolved in accordance with Wyoming law providing for the actions which survive the death of the person injured.

Wyoming's survival statute is W.S. 1977 §1-4-101 (Petitioner's Appendix p. 46). Its specific provision that "In actions for personal injury damages, if the person entitled thereto dies recovery is limited to damages for wrongful death" is unmistakable. It allows nothing for support, society, comfort, protection, care, companionship, services of the wife, other family members or beneficiaries.

Occasionally, it has been said that the two sections of Wyoming statutes dealing with wrongful death (listed as W.S. 1977 §§2-14-201 and 2-14-202 in Petitioner's Appendix p. 47, 48, but renumbered in 1982 by the Wyoming Legislature as W.S. 1982 Repub. §§1-38-101 and 1-38-102) constitute a type of survival statute. This is incorrect!

The Wyoming Supreme Court addressed the question at length in *Coliseum Motor Co. v. Hester,* 3 P.2d 105 (Wyo. 1931), pointing out that the predecessor of these statutes, (5560 and 5561 Wyoming Compiled Statutes 1920 — Defendants Appendix) the provisions of which were essentially the same, did not constitute a survival act, but rather legislation in which the measure of damages was for the *loss to the deceased's beneficiaries.* There, the Court at p. 197 said:

> "[1,2] 2. *It is the theory of the appellant that the statute in question is a survival act.* By that is ordinarily meant a statute which merely preserves and continues the right of action which the deceased had prior to his death. And it is argued that, under the authorities (17 C. J. 1197), since the decedent died instantaneously, he never had any right of action at all, and therefore respondent has none. Much and abstruse learning has been expended upon the proposition as to whether statutes like that under consideration are survival statutes or statutes creating a new cause of action. *We cannot agree with the appellant's argument. It flies directly in the face of the express provisions of the statute, which says specifically that an action for damages shall lie notwithstanding the fact that death may ensue, without limiting the right to cases where death is not instantaneous. Counsel would read that into the statute. It is not there. The foundation of the action is the wrongful act of the defendant which resulted in death. No remedy existed at common law.* The statute was intended to make a change. It is a survival statute in

the sense that damages may now be recovered for the wrongful act, notwithstanding that death may result, whether instantaneously or otherwise. *It gives a new cause of action for the same reason and for the further reason that the action is not one transferred from the decedent to the administrator but is one given directly to the administrator for the benefit of certain living relatives.* (Emphasis supplied)

The Federal Court has given the same interpretation to Wyoming's wrongful death statutes in *Ashley v. Read Construction Company,* 195 F. Supp. 727, 729 (D. Wyo. 1961), where it was said:

"The amount recovered under the statute is held for the persons entitled thereto. The whole import of the wrongful death act is to *benefit those persons who have been injured because of the death of their relative . . .*" (Emphasis supplied)

The distinction between wrongful death statutes and survival statutes was addressed at length by this Court in the footnotes of *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 39 L.Ed.2d 9, 94 S.Ct. 806. These teachings were noted and followed by the Wyoming Supreme Court in *DeHerrera v. DeHerrera,* 565 P.2d 479, 482 (Wyo. 1979) where it was said:

"It would be helpful to a further and better understanding of our reasoning if we explain the distinguishing features of a wrongful death act as compared to a survival statute. It must be realized that the wrongful death statutes, §§1-1065 and 1-1066, are not part of the probate code, though provision is made for the appointment of an administrator. The designation of an administrator as a trustee is only a device to provide a party to file suit and pay over any damages collected to the beneficiaries designated by statute. The amount recovered does not become a part of the decedent's estate and is not

liable for debts of the estate or subject to estate administration. Jordan v. Delta Drilling Company, Wyo. 1975, 541 P.2d 39, 42.

On the other hand, a survival statute permits recovery by the decedent's personal representative on behalf of the estate; the prime difference between survival and wrongful death statutes is that the survival statute merely continues a cause of action in existence. The injured party's claim after death is an asset of the estate while the wrongful death statute creates a new cause of action for the benefit of designated persons who have suffered the loss of a loved one and provider. Speiser, Recovery for Wrongful Death, 2d (1975), §14:1, p. 408. As said in Sea-Land Services, Inc. v. Gaudet, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, footnote 2, reh. den. 415 U.S. 986, 94 S.Ct. 1582, 39 L.Ed.2d 883, survival statutes permit the personal representative of deceased to prosecute any claims for personal injury the deceased would have had but for his death but do not permit recovery for harms suffered by the decedent's family as a result of his death."

Plaintiff Rosa obviously brought her action under the provisions of the wrongful death statutes (W.S. 1977 §§2-14-201 and 2-14-202, renumbered W.S. 1982 Repub. §§1-38-101 and 1-38-102), since she alleged that:

"Immediately prior to death, Michael Rosa, decedent, was an adult person of the age of twenty-nine years who was in good physical and mental condition, was a faithful and dutiful husband and father and *source of support, society, comfort, protection, care, companionship and services* to his beneficiaries . . . As the direct and proximate result of the above conduct of the Defendants, the Plaintiff, as the Personal Representative of the decedent, Michael Rosa, had been damaged in excess of

$1,000,000.00, including *damages for loss of probable future companionship,* society and comfort." (Tr. Vol. I, pp. 2, 7, 8) (Emphasis supplied)

Thus, Plaintiff sought damages *for herself* and other beneficiaries of the decedent, under Wyoming's wrongful death statutes, not the damages which the decedent might have claimed entitlement, under 42 U.S.C. §1983 for violation of his constitutional rights, had he lived. Accordingly, Plaintiff had no cognizable claim under 42 U.S.C. §§1983 and 1988, as her pleadings fully demonstrated.

The Trial Court should have granted Defendants' Motion to Dismiss. The decision of the Circuit Court should be reviewed and, upon full consideration, should be reversed.

Respectfully submitted,

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